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No. 94-661

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

W.R. GRACE & CO.-CONN.,
Petitioner,
v.
MARYLAND CASUALTY COMPANY,
ROYAL INDEMNITY COMPANY and
AETNA CASUALTY & SURETY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT MARYLAND CASUALTY COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May this Court entertain a petition for a writ of certiorari when the petition was filed two months out of time?

2. Should certiorari be granted based on a purported need to realign the parties when all parties to this action are aligned correctly under any judicially-recognized approach to proper alignment?

3. Should this Court grant certiorari to review a challenge to the application of state law to a dispute regarding insurance coverage for asbestos-in-buildings claims?

STATEMENT PURSUANT TO RULE 29.1

Respondent Maryland Casualty Company is a corporation organized under the laws of Maryland and is a wholly-owned subsidiary of Zurich Insurance Company.

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RESPONDENT MARYLAND CASUALTY COMPANY'S BRIEF IN OPPOSITION

Respondent Maryland Casualty Company ("Maryland") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Second Circuit.

JURISDICTION

Pursuant to 28 U.S.C. § 2101 and Rule 13.4 of the Rules of the Supreme Court, this Court is without jurisdiction to entertain this petition because it was filed approximately five months after entry of the Second Circuit's amended judgment on rehearing.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved: 28 U.S.C. § 1332; 28 U.S.C. § 2101(c); Supreme Court Rule 13.4. Petitioner has reproduced 28 U.S.C. § 1332 at page 2 of its Petition. The entire text of 28 U.S.C. § 2101(c) and Supreme Court Rule 13.4 is reproduced in the Appendix attached hereto. (R. App. 1a.)[1]

COUNTERSTATEMENT OF THE CASE

A. Nature Of The Case

On October 11, 1983, Maryland commenced this action against its insured, Petitioner W.R. Grace & Co.-Conn. ("Grace") and the Continental Casualty Company ("CNA"), Grace's subsequent primary insurer. In an action governed by New York law, Maryland sought a judicial allocation of responsibility among Maryland, Grace and CNA for thousands of asbestos-related bodily injury claims filed against Grace. Maryland had been sharing defense costs for such claims equally with CNA. Maryland also sought a declaration that it owed nothing to Grace and CNA for asbestos-in-buildings cases filed against Grace. CNA had been defending such cases but Maryland had not.

In 1984, Maryland learned of primary liability insurance that had been issued to companies that had manufactured and distributed asbestos-containing materials and were subsequently acquired by Grace. Royal Indemnity Company ("Royal"), the General Insurance Company of America ("General"), and Aetna Casualty & Surety Company ("Aetna") were the insurers of those acquired companies. Those insurers all refused to defend or indemnify asbestos claims.

Maryland amended its complaint to add those insurers as defendants. Maryland sought to compel them to share

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[1] R. App. refers to the attached appendix of Respondent Maryland Casualty Company.

with it the responsibility for asbestos-related bodily injury claims against Grace. Specifically, Maryland sought reimbursement for a portion of its payments from Royal, General, and Aetna, which had paid nothing.

This action did not pit the insurers as a group against their insured. Grace and CNA have never been adverse. (P. App. 15a.)[2] Grace and each defendant insurer filed counterclaims against Maryland. Maryland vigorously disputed its rights and obligations to Grace[3] and each defendant insurer. Although Maryland and CNA had both paid large sums for Grace's defense costs, they disagreed about their relative obligations. CNA asserted a $60 million claim against Maryland to be "indemnified for money it paid to Grace."[4] (P. App. 15a.) Aetna, Royal and General each asserted counterclaims and denied any obligation to Maryland.

Maryland moved for partial summary judgment against Aetna, General and Royal in 1987. Maryland continued to pursue its claims against Aetna, General and Royal during the pendency of this appeal, which was made pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. In 1992, Maryland took its claim against Aetna to trial; the dispute settled only after the jury was impanelled. Together with CNA and Grace, Maryland took a portion of its case against Royal to trial in April of this year. That trial settled before a jury verdict was rendered but the balance of Maryland, CNA and Grace's claims against Royal remain pending today in the district court. In April and May of this year, Maryland and CNA took to trial a portion of their claims against General. No verdict has yet been rendered in that bench trial.

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[2] P. App. refers to the Appendix filed by the Petitioner.

[3] Maryland and Grace settled their dispute in 1991. Grace has subsequently settled its disputes with CNA, Aetna and General.

[4] Maryland and CNA settled in 1993.

B. Proceedings And Disposition Below

1. The District Court

Maryland filed this action against Grace and CNA based on diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). Maryland sought to amend its complaint in 1984 to include Royal, General and Aetna. Grace opposed Maryland's motion on the ground that the additional defendants would destroy diversity jurisdiction.[5] On April 23, 1985, the district court granted Maryland leave to amend its complaint to include Royal, General, and Aetna. Until this appeal was before the Second Circuit more than five years later, Grace never moved to realign the parties.

In 1986, this case was assigned for all purposes to United States Magistrate Judge Leonard A. Bernikow, pursuant to 28 U.S.C. § 636(c), with the consent of the parties. On cross-motions for partial summary judgment, the district court held, on March 1, 1991, *inter alia*, that the "date of discovery" trigger governs coverage for asbestos-in-buildings claims under Maryland's policies.[6] (P. App. 64a.) The court also held that discovery took place after Maryland's policies expired, and therefore that Maryland had no obligation for the asbestos-in-build-

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[5] Grace's opposition to Maryland's proposed joinder was unsurprising—Grace has attempted to derail this declaratory judgment action nine times by filing duplicative actions in other courts. Several of those courts have dismissed Grace's competing actions. *See, e.g., W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 407 Mass. 572, 555 N.E.2d 214 (1990); *W.R. Grace & Co. v. Home Ins. Co.*, No. 89-7976, slip op. at 7-9 (Minn. Dist. Ct., Hennepin County Nov. 3, 1989); *W.R. Grace & Co.-Conn. v. Admiral Ins. Co.*, No. 91-048251 (Tex. Dist. Ct., Harris County Feb. 7, 1992), *appeal dismissed*, No. B14-92-00965-CV (Tex. Ct. App. Apr. 29, 1993).

[6] Other issues decided on partial summary judgment, including issues that may eliminate or limit a duty to defend or indemnify all or many of the asbestos-in-buildings cases, are not before this Court on this appeal from the Rule 54(b) judgment.

ings claims against Grace. (P. App. 64a.) The district court adhered to its decision in reconsideration orders dated July 8, 1991 and October 22, 1991.

Based on these decisions, Maryland moved for entry of final judgment pursuant to Fed. R. Civ. P. 54(b). Royal independently moved for a Rule 54(b) judgment, seeking to benefit from the rulings in Maryland's favor. Separate orders granting Maryland's and Royal's Rule 54(b) motions are virtually identical. (P. App. 10a.)

2. *The Court of Appeals*

Grace noticed its appeal of the Rule 54(b) judgment in favor of Royal on December 20, 1991.[7] While the appeal was pending, Grace moved the United States Court of Appeals for the Second Circuit to vacate the district court's decision for lack of subject matter jurisdiction on the ground that the insurer defendants should be realigned as plaintiffs. A ruling on Grace's motion was referred to the Second Circuit panel that would address the merits.

On September 1, 1993, the Second Circuit, adhering to this Court's decision in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941), found that the parties were aligned properly and upheld subject matter jurisdiction.[8] After a thorough analysis of the facts of this case, the court observed that:

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[7] Grace and Maryland stipulated to the dismissal of the appeal (91-9386) from the Rule 54(b) judgment entered in favor of Maryland. Maryland is a party here because this appeal challenges the March 1, 1991, July 8, 1991 and October 22, 1991 non-final orders entered in Maryland's favor. Because its rights are directly at stake in this appeal, Maryland moved the Second Circuit on March 5, 1992 to confirm its status as a party-appellee. The motion was granted on March 12, 1992.

[8] *Maryland Casualty Co. v. W.R. Grace & Co.*, No. 91-9322 (2d Cir. Sept. 1, 1993).

> In its effort to defeat diversity jurisdiction, Grace insists that the insurers are united in their efforts to deny Grace coverage. It states that inter-insurer disputes concerning contribution and indemnity are collateral because they will exist only to the extent that insurance coverage is established. This characterization of the facts we think ignores the practical reality of the litigation. Because the insurers are of a single mind to escape liability for paying claims does not mean that they are not in conflict with one another. In fact, the disputes among the insurers have been significant from the start of the lawsuit and produced the required collision of interests to sustain diversity.

(P. App. 15a.)

In reaching its decision, the Second Circuit found that "actual and substantial controversies exist among the insurers and Grace." (P. App. 16a-17a.) The court held both that realignment was not required under the "collision of interests" test *and* that "realignment would be inappropriate even under the primary purpose test" advocated by Grace. (P. App. 15a.) Accordingly, the court held that there was no possibility of a jurisdictional defect due to misalignment of the parties on the facts of this case.

On the merits, the Second Circuit reversed Magistrate Judge Bernikow's finding that the "date of discovery" trigger governs coverage for asbestos-in-buildings claims under Maryland's and Royal's policies. It also rejected Grace's theory of continuous injury, holding that property damage from asbestos-in-buildings is not "ongoing" beyond the time of installation. (P. App. 26a-27a.) Instead, it found that, under New York law, insurance coverage for asbestos-in-building claims is triggered by "injury-in-fact" which occurred at the time when Grace's asbestos-containing product was installed in buildings.

3. *The Rehearing Petitions*

On September 29, 1993, Grace and Royal filed separate petitions for rehearing, suggestions for rehearing *in banc*, and motions for certification to the New York Court of Appeals. (R. App. 2a-3a.) Grace was supported by numerous *amici*. The central theme of Grace and the *amici* in support of rehearing was that the court had made an improper "finding of fact" when it made its trigger of coverage ruling. Grace also asked for rehearing on the realignment issue.

The Second Circuit panel granted rehearing on the trigger of coverage issue on January 11, 1994. It denied rehearing on the realignment issue and did not certify a question to the New York Court of Appeals. (P. App. 88a-89a.)

On May 16, 1994, the Second Circuit issued its amended judgment. The court's amended judgment—as recognized by Grace—was "essentially the same as the September 1993 decision, with some non-substantive editing." Grace Petition at 9. The amended judgment was entered on May 16, 1994, and filed on May 19, 1994.

No order as to *in banc* consideration was issued when the amended judgment was entered. (P. App. 1a-2a.) On June 13, 1994, Grace submitted a second "Petition for Rehearing *en banc*." (R. App. 4a-5a.) On June 22, 1994, the Second Circuit denied Grace's original suggestion for rehearing *in banc*. Grace's second request for *in banc* review was denied on July 15, 1994. The Second Circuit's mandate was issued on July 22, 1994.

Grace filed its petition for a writ of certiorari with this Court on October 13, 1994.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE PETITION IS UNTIMELY BECAUSE IT WAS FILED FIVE MONTHS AFTER THE SECOND CIRCUIT ENTERED ITS AMENDED JUDGMENT

Rule 13.4 of this Court states that:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and *not from the date of the issuance of the mandate* . . . . However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or *the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.*

Sup. Ct. R. 13.4 (emphasis added); *see also* 28 U.S.C. § 2101(c) (1988); *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) ("the period in which a petition for certiorari must be sought [is tolled only] until . . . a new judgment is entered on rehearing").

The panel of the Second Circuit deciding this case granted rehearing on January 11, 1994, and entered its "new" and "subsequent" judgment on May 16, 1994. Accordingly, Grace's petition for a writ of certiorari was due ninety days later—on August 15, 1994. Because the petition was not filed until October 13, 1994—almost two months out-of-time—it must be dismissed for lack of jurisdiction.

This Court has repeatedly recognized that the time limitations prescribed by Congress in 28 U.S.C. § 2101(c) with respect to civil cases are "mandatory and jurisdictional." *Jenkins*, 495 U.S. at 45; *accord Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943); *De-*

partment of Banking v. Pink, 317 U.S. 264, 268 (1942); *Boylan v. United States*, 257 U.S. 614, 614 (1921); *Citizens Bank v. Opperman*, 249 U.S. 448, 450-51 (1919); *see also* Robert L. Stern et al., *Supreme Court Practice* § 6.1(d), at 278 (7th ed 1993). There is no exception to this Rule for civil cases, and an untimely petition cannot be considered regardless of the circumstances. *Deal v. Cincinnati Bd. of Educ.*, 402 U.S. 962 (1974) (airline lost all the papers and caused the petition to be filed on the next working day); *Teague v. Regional Comm'r of Customs*, 394 U.S. 977 (1969) (an unusually severe snowstorm caused the petition to arrive two days late).

To be sure, Grace filed a further pleading in the Second Circuit on June 13. However, that pleading plainly did not toll the running of the ninety day limit under Rule 13.4. The caption of that pleading and its contents explicitly stated that it sought only "rehearing *en banc*" under Rule 35(b) of the Federal Rules of Appellate Procedure. (R. App. 4a-5a.) Rule 13.4 provides that seeking rehearing *in banc* under Rule 35(b) does *not* extend the time for seeking certiorari.

Grace should not now be heard to contend that its June 13 filing in the Second Circuit was something other than a Rule 35(b) request, *i.e.*, a second request for rehearing by the panel. Neither the Federal Rules of Appellate Procedure nor the local rules of the Second Circuit allow a petitioner to file successive petitions for rehearing.[9] Grace's June 13 pleading was plainly—and necessarily—directed to the full Second Circuit bench and sought only *in banc* consideration. It was not addressed

[9] *See, e.g., National Latex Prods. Co. v. Sun Rubber Co.*, 276 F.2d 167, 168 (6th Cir. 1960) ("Neither the applicable statute nor the rules of this Court authorize a second or successive petitions for rehearing."); *Magidson v. Duggan*, 219 F.2d 946, 947 (8th Cir. 1955) (same); *F.H.E. Oil Co. v. Commissioner*, 150 F.2d 857, 858 (5th Cir. 1945) (same); *City of Stuart v. Green*, 91 F.2d 603, 606 (5th Cir. 1937) (same).

to the panel that had just ruled on rehearing.[10] Under Rule 13.4 of this Court, that filing does not save Grace from its tardiness in petitioning for certiorari.[11]

Accordingly, Grace petitioned for certiorari out of time. This Court does not have jurisdiction to entertain its petition.

II. THE ALIGNMENT OF PARTIES IN THIS CASE WAS PLAINLY PROPER AND ANY DIVERGENCE IN APPROACH TO ALIGNMENT AMONG LOWER COURTS IS NOT IMPLICATED HERE

Grace argues that the parties need to be realigned so as to destroy diversity and deprive the federal court of jurisdiction. After eleven years of hard-fought litigation, Grace asks this Court to reject the assessment of the lower courts and impose Grace's wholly artificial characterization of which parties are supposedly most at odds with each other. On that essentially factual basis, Grace would

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[10] Although Grace's submission was styled as a "Petition for Rehearing *en banc*," it was clearly a mislabeled "Suggestion for Rehearing *in banc*." A review of the contents of the document reveals that it was directed only to the full Second Circuit bench—not the panel. (R. App. 4a-5a.) Nowhere does the document request or suggest that the Second Circuit panel rehear what it had just finished reconsidering. Indeed, in the following weeks, counsel for Grace represented to the district court and the Second Circuit that Grace sought only *in banc* rehearing. *Maryland Casualty Co. v. W.R. Grace & Co.*, No. 88 Civ. 2613 (SWK), tr. at 3-4, 6 (S.D.N.Y. June 6, 1994) ("[W]e, being Grace, have moved for *rehearing en banc*. . . . We hope . . . that your Honor would wait, as you did last September, until the Second Circuit, *as a full circuit*, decides Grace's petition . . . ." (statement of Philip G. Barber, counsel for Grace) (emphasis added)) (R. App. 6a-10a); Letter from Anthony J. Marchetta, Counsel for Grace, to Olivia George, Office of the Clerk, U.S. Court of Appeals for the Second Circuit (June 28, 1994) ("Grace's present petition for *rehearing en banc* is still before the Court for consideration." (emphasis added)) (R. App. 11a).

[11] A ruling that the petition is untimely would not be inconsistent with this Court's decision in *Missouri v. Jenkins*, 495 U.S. 33 (1990), because in that case the Petitioner had mislabeled its *original* rehearing petition to the Court of Appeals as a petition for rehearing *in banc*.

have this Court relieve Grace of a judgment that it does not like.

Grace dresses up its factual argument as one involving a supposed conflict between the circuits in interpreting this Court's holding in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941). As the Second Circuit noted, however, under *any* interpretation of *Indianapolis*, the alignment of the parties *in this case* is correct. (P. App. 15a.) Accordingly, even if Grace's petition were timely, this case would be unworthy of certiorari and the petition would properly be denied.

The Second Circuit's decision recognized that, under *Indianapolis*, realignment is "a fact-specific inquiry" requiring an examination of the "realities of the record" to discover the parties' "real interests." (P. App. 14a) (quoting *Indianapolis*, 314 U.S. at 69). The court then analyzed the actual conflicts between the parties in this case, and found that there were real and substantial conflicts between Maryland and Grace's other insurers. The "realities of the record" disclosed that Maryland was as adverse to Grace's other insurers as it was to Grace. As described by the court, "with millions of dollars at stake, which of them must pay or how far back coverage would extend inevitably pitted each insurer against all the others." (P. App. 16a.)

Finding that Grace's "characterization of the facts . . . ignores the practical reality of the litigation," the Second Circuit held that:

> Maryland's amended complaint suggests adversity among the insurers with the allegation that its liability "is directly affected by the interpretation of the rights and duties of Grace (or its predecessor companies) and each of the defendant insurers under their respective contracts of insurance." Disunity among the insurers is established further because Continental [CNA], Grace's current insurer, *never* has been adverse to Grace and, in fact, is actively

> pursuing a $60 million counterclaim against Maryland to be indemnified for money it paid to Grace. Continental, in addition, has filed cross-claims against Royal, Aetna and General.

(P. App. 15a) (emphasis in original).

In reaching its conclusion, the Second Circuit held that under the "collision of interests" test articulated in *Indianapolis*, actual and substantial controversies existed among the insurers and therefore realignment of the parties was improper. (P. App. 16a-17a.)

Further, the Second Circuit said that "realignment would be inappropriate even under the primary purpose test" advocated by Grace. (P. App. 15a.) Indeed, "the insurers were at all times adverse." (P. App. 16a.)[12]

The reality is that Maryland has litigated aggressively against CNA, General, Aetna and Royal. Indeed, all three of the trials held in this case have pitted Maryland against another insurer. Similarly, CNA has been litigating actively against General and Royal. According to the view that Grace advocates, all of those antagonists are to be seen as constructive co-plaintiffs whose massively litigated disputes are to be judicially transformed into mere subordinate cross-claims. The only parties in this case that have never been adverse to one another are Grace, which sees itself as the sole proper defendant, and CNA, which Grace asserts must somehow be a plaintiff.

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[12] The Second Circuit observed that under *Indianapolis*, the "collision of interests" test is the proper test for determining the suitability of realignment. (P. App. 13a.) The court did not employ the "primary purpose" test, reasoning that such an "approach is not actually dictated by *Indianapolis* because though the facts of that case involve only a single controversy among the litigants involving the enforceability of a 99-year lease, the Supreme Court did not intend that all cases be forced into a single issue posture." (P. App. 14a.) However, this analysis was not necessary to the Second Circuit's holding. In fact, the Second Circuit itself emphasized that Grace's position was without merit under either approach.

Grace's bizarre reshuffling of parties and their interests and claims is transparently calculated to evade an adverse judgment below. As the Second Circuit recognized, this case is clear-cut. This case does not implicate any divergence among circuits about how to approach realignment of parties in harder cases.

The two principal cases relied upon by Grace apply a "primary purpose" analysis that differs somewhat from the Second Circuit's approach. However, they do not reflect a split in the circuits as to the outcome in a case such as this one. In *Employers Insurance of Wausau v. Crown Cork & Seal Co.*, 942 F.2d 862 (3d Cir. 1991), the Third Circuit upheld realignment of the insurer parties because "[t]heir common adversity to [the policyholder] is evident. There is no insurer who is not antagonistic to [the policyholder]." *Id.* at 866. Further, that court found that "the disagreements among the insurers who are presently grouped together as defendants are not so great." *Id.* Here, of course, the only parties that have never been adverse are the policyholder and an insurer (CNA). In this case, it is the "disagreements" among insurers that are fundamental. Thus, far from adopting a conflicting rule, the Third Circuit, like the Second, plainly would have had no difficulty with the alignment of the parties in this case.

Similarly, in *United States Fidelity & Guaranty Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir. 1992), "*all* of the insurance companies opposed [the policyholders]." *Id.* at 1091 (emphasis added). This characterization would not fit here. Thus, the Sixth Circuit would not have reached a result different from that of the Second Circuit on the alignment of parties in this case.

At bottom, Grace asks this Court to adopt a simplistic, wooden rule for aligning parties in an insurance coverage dispute. Under Grace's rule, the policyholder would automatically be deemed to be on one side and all of the in-

surers, regardless of their interests or positions, would be lumped on the other. That mechanistic approach finds no support in any of the cases.

If there is a need for this Court to sort out the supposedly disparate approaches of various lower courts to the "fact-specific" determination of whether parties are properly aligned for purposes of diversity jurisdiction, this case would be an odd vehicle for that task. Here, the recharacterization of the parties' positions offered by Grace is utterly at odds with reality. Further, any theoretical variations in the circuits' approaches to alignment would not produce a different outcome here. Accordingly, certiorari should not be granted.

III. THE DECISION REGARDING TRIGGER OF COVERAGE UNDER NEW YORK COMMON LAW PRESENTS NO ISSUE OF FEDERAL LAW

In recent years, numerous litigants have sought review by this Court of state common law insurance coverage cases. The Court has uniformly denied certiorari.[13]

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[13] *See, e.g., Tonka Corp. v. Bituminous Casualty Corp.*, 9 F.3d 51 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994); *Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co.*, 962 F.2d 1484 (10th Cir.), *cert. denied*, 113 S. Ct. 411 (1992); *Broderick Inv. Co. v. Hartford Accident & Indem. Co.*, 954 F.2d 601 (10th Cir.), *cert. denied*, 113 S. Ct. 189 (1992); *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 938 F.2d 1423 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992); *FL Aerospace v. Aetna Casualty & Sur. Co.*, 897 F.2d 214 (6th Cir.), *cert. denied*, 498 U.S. 911 (1990); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Borden, Inc. v. Affiliated Ins. Co.*, 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 493 U.S. 817 (1989); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981); *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992), *cert. denied*, 113 S. Ct. 1585 (1993).

Grace is the latest litigant to ask the Court under the guise of a procedural irregularity to examine a substantive state law determination.

On the merits, the Second Circuit in this case dealt under New York law with a frequently litigated issue of insurance policy interpretation concerning losses in which actions taken in an earlier era allegedly cause harm that only becomes apparent many years later. On appeal from summary judgment below, the Second Circuit decided which of the insurance policies issued from the time when the causative acts began through the resolution of the resulting harm potentially respond to the tort claim. Addressing property damage claims, it built upon an earlier decision, *American Home Products, Inc. v. Liberty Mutual Insurance Co.*, 748 F.2d 760 (2d Cir. 1984), which had predicted how the New York courts would resolve those issues in the context of bodily injury claims.[14] Adhering to the same "injury in fact" standard articulated in *American Home Products*, the Second Circuit ruled that as a matter of law, "actual injury to property—the presence of the asbestos hazard—occurs upon installation and exists regardless of whether it yet has been discovered by the building owners." (P. App. 25a.)

Grace asks this Court to review that determination, which it contends somehow involved "impermissible appellate fact-finding" under Rule 56 of the Federal Rules of Civil Procedure. Grace Petition at 16. The proper interpretation of an insurance policy is, of course, a question of law to be determined by the court.[15]

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[14] *American Home Products* was ultimately adopted as New York law by *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 651, 609 N.E.2d 506, 511, 543 N.Y.S.2d 966, 971 (1993).

[15] *See, e.g., Christiana Gen. Ins. Corp. v. Great American Ins. Co.*, 979 F.2d 268, 274 (2d Cir. 1992); *Caporino v. Travelers Ins. Co.*, 62 N.Y.2d 234, 238, 465 N.E.2d 26, 28, 476 N.Y.S.2d 519, 521 (1984); *see also Anetsberger v. Metropolitan Life Ins. Co.*, 14 F.3d

In this case, the Second Circuit made precisely such a legal determination. Grace is simply incorrect in asserting that the Second Circuit resolved factual disputes against it on summary judgment. To the contrary, the Second Circuit assumed *arguendo* the factual predicate that Grace alleges it never had an opportunity to prove. Specifically, it assumed that asbestos fibers are constantly released and reentrained in buildings. It held as a matter of law that the release and reentrainment of asbestos fibers does not constitute additional insured "property damage." Thus, the court explained:

> Next, it must be decided whether the injury to property continues after the discrete event of asbestos installation. . . . Once installed, the damage the asbestos inflicts is complete. The underlying plaintiffs contend that asbestos fibers are constantly released and reentrained into a building's atmosphere, creating further property damage. *If such deterioration in fact exists,* its damaging effect concerns solely the health of those persons who breathe the contaminated air. No further property damage occurs . . . .

(P. App. 26a) (emphasis added).

Thus, far from rejecting Grace's factual contentions on an impermissible basis, the Second Circuit held that, even if true, Grace's factual thesis would be insufficient as a matter of law to sustain Grace's interpretation of its insurance contract. This is, of course, precisely the kind of analysis this Court has urged the lower courts to conduct under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-49 (1986).

1226, 1231 (7th Cir. 1994); *Bird v. Centennial Ins. Co.,* 11 F.3d 228, 232 (1st Cir. 1993); *Langley v. Allstate Ins. Co.,* 995 F.2d 841, 844 (8th Cir. 1993).

Grace's contention that the Second Circuit's decision "fail[s] to consider the evidence developed by the plaintiffs in the underlying tort cases against Grace and the nature of the asbestos-related liability imposed on Grace in those cases" (Grace Petition at 23) ignores the Second Circuit's analysis, which assumes the truth of the allegations in the underlying cases regarding the nature of the underlying liability (*i.e.*, the release and reentrainment of asbestos fibers) and nonetheless finds that those events do not trigger additional coverage.

Grace cannot point to any failure of procedure in the lower courts. Its efforts to do so simply seek to involve this Court in questions of state law.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 14, 1994

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APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2101(c) (1988):

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Supreme Court Rule 13.4:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

91-9322

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARYLAND CASUALTY COMPANY,
Plaintiff-Appellee,

v.

W.R. GRACE AND COMPANY,
Defendant-Appellant,

CONTINENTAL CASUALTY COMPANY;
AETNA CASUALTY & SURETY COMPANY and
GENERAL INSURANCE COMPANY OF AMERICA,
Defendants,

ROYAL INDEMNITY COMPANY;
AETNA CASUALTY AND SURETY COMPANY,
Defendants-Appellees.

PETITION FOR REHEARING, SUGGESTION FOR REHEARING *EN BANC*, AND MOTION FOR CERTIFICATION TO THE NEW YORK COURT OF APPEALS

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91-9322

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Defendants,

ROYAL INDEMNITY COMPANY;
AETNA CASUALTY AND SURETY COMPANY,
Defendants-Appellees.

W.R. GRACE AND COMPANY'S PETITION FOR REHEARING *EN BANC*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 2613 (SWK)

THE MARYLAND CASUALTY COMPANY,
Plaintiff,

v.

W.R. GRACE & CO.-CONN. *et al.*,
Defendants.

New York, N.Y.
June 6, 1994
11:00 a.m.

Before:

HON. LEONARD BERNIKOW,

United States Magistrate Judge

APPEARANCES

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ANDERSON KILL OLICK & OSHINSKY
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* * * *

[3] THE COURT: I guess the first thing we might discuss is the time in which Grace should respond to the CNA motion for partial summary judgment.

What is your position on that, Mr. Barber?

MR. BARBER: As you may be well aware, in the tortuous roller coaster of this appeal, the Second Circuit initially rendered a decision in September of last year, and then Grace petitioned for rehearing. And the Court indicated that it was interested in hearing whether remand was possible. Nobody objected to that.

Then in January the Second Circuit did grant rehearing and asked for further rebriefing. There was a very elaborate reproving. Grace filed a brief. There was oppo-

sition brief on rehearing. There were a number of amicus briefs put in.

And as you may also note, on May 16 of this year, the Second Circuit issued exactly the same opinion they issued nine months earlier.

Because of that history and because of the particular nature of the Second Circuit's decision regarding the issue of appellate fact-finding, we, being Grace, have moved for rehearing en banc. We filed on last Tuesday. We hope you did get a copy.

We hope, because of the long history and the tortuous rehearing and the many issues involved, that your [4] Honor would wait, as you did last September, until the Second Circuit, as a full circuit, decides Grace's petition before your Honor even takes up whether or not you are to apply Second Circuit's trigger.

THE COURT: What is the usual time frame for them to determine whether to grant en banc consideration?

MR. BARBER: It is hard to say. Usually, the en banc would be at the same time which we did last September. And if the panel does not grant rehearing, as it did in this case, the entire circuit never considers the issue and never tells you whether they grant or deny it because it has been taken up by the same panel. This is an unusual situation where we have had a rehearing, and we are moving for a second hearing en banc, based on the unusual nature.

THE COURT: You may recall I indicated at that time that it was unlikely that you would get—

MR. BARBER: Yes. I recall some talk of the dim light at the end. It was unusual to grant rehearing and, granted rehearing, and go through three or four months of briefing and have the same decision issued almost verbatim—that's why we think there is more than the usual dim light, because there are a lot of issues. Not only are there triggers of coverage issues, but this procedural issue of due process as well the jurisdictional issue which is still pending—and these are issues of large import among

[5] the Circuit and issues the Second Circuit is interested in. The issue of trigger—

THE COURT: What do you mean by "procedural issue of due process"?

MR. BARBER: Your Honor, the issue is that the Second Circuit wasn't allowed—

THE COURT: It was a factual finding?

MR. BARBER: Not only was it not in contradiction of the record, but there was no record developed because the initial decision didn't go up on the issue of installation trigger; it goes up on the issue of when discovery occurred. So there is no record, and we believe that it should be remanded to your Honor for determination of the facts.

MR. CONDON: Your Honor, Cushing Condon, for Continental Casualty.

The Second Circuit has made its decision. How it has come down is quite clear. There is no need for any further delay. Your Honor ruled that, when they did come down the second time, that Grace would have, I believe, two weeks to put in their opposition papers. That two weeks has come and gone, and I think we should move forward.

THE COURT: Let me ask you this, Mr. Condon. Do you have any idea how long it would take the Second Circuit to grant en banc consideration?

MR. CONDON: I have no idea, but I assume, when [6] they will, they will deny it.

THE COURT: I assume they will deny it. They grant very few en banc applications, even less than they grant hearing.

MR. BARBER: That is true, but we do have the unusual scenario here. We filed a short 15-page brief which, oddly enough, the Second Circuit calls us, "We already have a petition for en banc. Why is there a second?" They still had circulating the one from September. We had to explain to them, it is another one, and they have all the issues before them.

And I don't think it would take them very long to decide whether they want to go through the unusual step of hearing this among all the judges.

THE COURT: What is the state of the appeal in the Stonewall case?

MR. BARBER: There may be people in this case that know better than I know. That appeal has been decided, I know the appeal decision came down two years ago.

THE COURT: In this case here, in the Stonewall case?

MR. CONDON: I'm not really familiar with it.

MR. BARBER: Anyway, the decision was two years ago. I have to believe, even with the briefing, it had been before the Second Circuit for quite awhile. Then, your

* * * *

PITNEY, HARDIN, KIPP & SZUCH

Morristown, New Jersey 07962-1945

June 28, 1994

Ms. Olivia George
Office of the Clerk
U.S. Court of Appeals
for the Second Circuit
40 Centre Street
Foley Square, Room 1702
New York, New York 10001

Re: Maryland Casualty Co. v. W.R. Grace
Docket No. 91-9322

Dear Ms. George:

We represent W.R. Grace in the above-referenced matter. This will confirm our telephone conversation on Thursday, June 23, 1994, during which you explained to me that a document dated June 21, 1994 and issued by your office is an administrative pleading designed to close the file on Grace's earlier petition for rehearing *en banc*, dated September 29, 1993. Grace's present petition for rehearing *en banc* is still before the Court for consideration.

Sincerely,

ANTHONY J. MARCHETTA

ALM:mo

cc: See Attached Service List